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No. OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

ROBERT A. HUPPELER, EDWIN C. MAGLI and
ELLWOOD SANDMIRE,

Petitioners,

v.

OSCAR MAYER FOODS CORPORATION
Plan Administrator, and PENSION PLAN NO. 1,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO PETITION

RICHARD V. GRAYLOW, ESQ.
Counsel for Petitioners
Lawton & Cates, S.C.
P.O. Box 2965
Madison, WI 53701-2965
(608) 256-9031

JOHN C. TALIS, ESQ.
Counsel of Record
Lawton & Cates, S.C.
P.O. Box 2965
Madison, WI 53701-2965
(608) 256-9031

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE OFFSET OF WORKER'S COMPENSATION BENEFITS AGAINST BENEFITS PROVIDED BY A QUALIFIED PENSION PLAN CONSTITUTE AN IMPERMISSIBLE FORFEITURE, IN VIOLATION OF 29 U.S.C. §1053(a) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) OF 1974, WHERE THE WORKER'S COMPENSATION BENEFITS AT ISSUE COMPENSATE FOR PERMANENT BODILY IMPAIRMENT RATHER THAN WAGE LOSS?

2. IF THIS COURT DETERMINES THAT SUCH OFFSETS ARE IMPERMISSIBLE PURSUANT TO 29 U.S.C. §1053(a), IS THE CHARACTER OF THE WORKER'S COMPENSATION AWARD AT ISSUE DETERMINED AS A MATTER OF FEDERAL COMMON LAW, OR WITH REFERENCE TO APPLICABLE STATE WORKER'S COMPENSATION LAW?

LIST OF PARTIES

ALL OF THE PARTIES TO THIS CASE ARE SHOWN IN THE CAPTION. PETITIONERS ARE ROBERT HUPPELER, EDWIN MAGLI, AND ELLWOOD SANDMIRE (HUPPELER). RESPONDENTS ARE OSCAR MAYER AND PENSION PLAN NO. 1 (OSCAR MAYER).

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OSCAR MAYER FOODS CORPORATION
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Bob Huppeler, Ed Magli, and Ellwood Sandmire, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered August 8, 1994, as last affirmed on denial of rehearing on October 5, 1994.

OPINIONS BELOW

The District Court opinion and order in this matter has not been published in the Federal Supplement. It is available on WESTLAW at 1993 WL 730699 (W.D. Wis. 1993). This opinion and order is reprinted in the appendix to this Petition. Petitioners' Appendix, (Pet. App.) 122-136.

The opinion and order of the Seventh Circuit Court of Appeals is found at 32 F.3d 245 (7th Cir. 1994), 62 USLW 2111 (7th Cir. 1994), and 18 Employee Benefit Cas. 1577 (7th Cir. 1994). This opinion and order is also contained in the appendix to this Petition. Pet. App. 101-121.

JURISDICTION

Huppeler invoked the jurisdiction of the District Court pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1132(e), as his case arises pursuant to ERISA, 29 U.S.C. §1001, et seq.

The District Court granted Oscar Mayer's motion for summary judgment in a memorandum and order dated October 27, 1993. Pet. App. 122-136. The District Court entered its judgment on October 29, 1993. Pet. App. 139.

Huppeler sought review in the Seventh Circuit Court of Appeals, invoking its jurisdiction pursuant to 28 U.S.C. §1291. The Seventh Circuit affirmed the District Court in a decision and order dated August 8, 1994. Pet. App. 101-121. Huppeler timely petitioned for rehearing, and also suggested rehearing en banc. The Seventh Circuit denied rehearing and rehearing en banc by order dated October 4, 1994, as amended by order dated October 5, 1994. Pet. App. 137-138.

Huppeler respectfully submits that this Court has jurisdiction to review the judgment of the Seventh Circuit by writ of certiorari, pursuant to 28 U.S.C. §2101(c).

LAW AT ISSUE

Federal Statute

29 U.S.C.S. §1053(a) (May, 1994 Supp.):

> Nonforfeitability requirements. Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age....

Federal Regulations

26 C.F.R. §1.401-1(b) (1) (i) (1994):

> ...a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses....

26 C.F.R. §1.401-4(b) (1994):

> ...a plan under which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be discriminatory because of such exclusion or difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401(a).

26 C.F.R. §1.401(a) (5) -1(f) (1994):

> In determining whether a plan satisfies section 401(a) (4) and this section, other benefits created under state or federal law (e.g., worker's compensation benefits or black lung benefits) may not be taken into account.

26 C.F.R. §1.411(a) -4(a) (1994)

> ...nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits....

Revenue Rulings

Rev. Rul. 78-178, 1978-1 Cum. Bull. 117-118:

> Section 1.401-4(b) of the Income Tax Regulations limits the State or Federal programs that may be used as an offset so that the total benefits resulting under the plan and under the program must establish an integrated and correlated retirement system satisfying the tests of section 401(a)... There are many types of benefits under public programs that do not lend themselves to integration with private pension plan benefits. Thus a correlated retirement system could not exist. Only those programs which provide benefits

that may be provided under a qualified pension plan may be used as an offset since only then could a correlated retirement system exist. For example, the benefits payable under State or Federal programs because of sickness and maternity, and which include cash benefits and medical services, may not be used as an offset to pension plan benefits because such benefits may not be provided under a qualified pension plan. See Section 1.401-1(b) (1) (i) of the regulations.

Unemployment compensation benefits are applied for temporary periods of layoff. Under section 1.401-1(b) (1) (i) of the regulations, a qualified pension plan may not provide layoff benefits. Consequently unemployment compensation falls into the broad category of State and Federal programs that may not be used as an offset to qualified pension plan benefits since such type of benefits may not be provided under a qualified pension plan.

Rev. Rul. 84-45, 1984-1 Cum. Bull. 115:

....In Alessi v. Raybestos Manhattan, Inc., 451 U.S. 504 (1981), 1981-1 C.B. 219, the Supreme Court held that certain pension plan provisions for offsets based on workers' compensation awards do not contravene the nonforfeiture provisions of the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. 93-406, 1974-3 C.B. 1. However, the Supreme Court acknowledged that

> the right of the parties to create a plan providing for offsets is not absolute. The Supreme Court, citing Rev. Rul. 78-178, 1978-1 C.B 118, noted that the Internal Revenue Service does not permit qualified plans to offset pension benefits by reimbursement of medical expenses, fixed sums made for bodily impairment, or unemployment compensation because such payments do not match up with any benefits available under a pension plan qualified under the Internal Revenue Code or ERISA. The court pointed out that "Without speaking directly of its own rationale, Congress embraced such IRS rulings." Id. at 521. See H.R.Conf. Rept. No. 93-1280, 93d Cong., 2d Sess. 277 (1974)....

Other Authorities

Brief of the United States as Amicus Curiae, Alessi v. Raybestos Manhattan, U.S. Supreme Court Docket Nos. 79-1943 and 80-193 (February, 1981), at 22-23, n. 13:

> ...to the extent that a workers' compensation award reimburses a worker for medical expenses or provides fixed payments for bodily impairment, the Commissioner [of Internal Revenue] does not permit such awards to be used to offset pension benefits because such awards may not be provided under a qualified pension plan. Rev. Rul. 78-178...1978-1 Cum. Bull. at 118...Thus...in no sense does the Commissioner's offset policy put an injured employee in a worse position than a healthy employee with comparable years of service under the pension plan.

STATEMENT OF THE CASE

Bob Huppeler, Ed Magli and Ellwood Sandmire are retired employees of Oscar Mayer. (R. 16, ¶8; R. 32, ¶8; R. 34, ¶7) Bob Huppeler worked for Oscar Mayer from October, 1964 to January 28, 1992. (R. 16, ¶3) Ed Magli worked for Oscar Mayer from 1949 to 1951, and again in 1953, and from 1956 to February 1, 1992. (R. 32, ¶¶3-4) Ellwood Sandmire's career with Oscar Mayer spanned the period 1955 through October 1, 1985. (R. 34, ¶3) All three men were members of the United Food and Commercial Workers (UFCW) Local No. 538 during their employment with Oscar Mayer. (R. 16, ¶3; R. 32, ¶4; R. 34, ¶3) All three men, subsequent to their retirement, received pension benefits through Pension Plan No. 1. (R. 16, ¶8; R. 32, ¶9; R. 34, ¶7). Pension Plan No. 1 was negotiated by Oscar Mayer and UFCW 538, and is administered by Oscar Mayer. (R. 20, ¶¶5, 13, and Bailey Attachment A.)

Bob Huppeler worked alongside noisy machinery involved in meat processing. (R. 16, ¶4) Prior to his retirement, on or about November 19, 1990, Huppeler was advised by his physician that he had suffered a permanent bilateral high frequency hearing loss. (R. 16, ¶7) Huppeler retired in January, 1992. Huppeler did not seek paid employment after his retirement. (R. 16, ¶9) A hearing on Huppeler's worker's compensation claim for his permanent hearing loss was held before the Wisconsin Department of Industry, Labor and Human Relations (DILHR) on June 9, 1992. (R. 16, ¶10) On or about July 13, 1992, DILHR awarded Huppeler a total of $6,562.62 as a result of a 21.1% work-related permanent partial loss of hearing. (R. 16, ¶11, and Huppeler Attachment A) Oscar Mayer appealed this

decision to the Wisconsin Labor and Industry Review Commission (LIRC) which ultimately affirmed DILHR's finding on or about February 26, 1993. (R. 16, ¶¶12-13, and Huppeler Attachments A and B)

On or about May 14, 1993, Huppeler received a letter from Craig R. Bailey, Oscar Mayer's Employee Benefits Manager. (R. 16, ¶14, and Huppeler Attachment C) Bailey's letter stated, in relevant part,

> I have been advised by the Madison Human Resources Department that you were recently awarded $6,844.41 in Worker Compensation benefits. Pension Plan No. 1 requires that all pensions be offset by any Worker Compensation awards. This offset is on a dollar-for-dollar basis.
>
> Beginning June 1, 1993, your pension will be stopped for a period of 19.78 months. On January 1, 1995, you will receive a payment of $75.89. Effective February 1, 1995 and thereafter your normal monthly pension payments in the amount of $346.02 will commence.

Like Huppeler, Magli and Sandmire are long time employees who believe they have suffered work-related occupational hearing loss as a result of their work at Oscar Mayer. (R. 32, ¶15; R. 34, ¶5-6, 8) Because of the same offset provision which was used against Huppeler by Oscar Mayer, however, both Magli and Sandmire have refrained from filing worker's compensation claims. (R. 32, ¶10-15; R. 34, ¶8-11)

Huppeler, Magli, and Sandmire (Huppeler) brought suit against Oscar Mayer in the Federal District Court for the Western District of Wisconsin on June 2, 1993, alleging the offset in question was an impermissible forfeiture in violation of 29 U.S.C. §1053(a). (R.2.) As noted above, jurisdiction was alleged pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1132(e).

The focus of the dispute before the District Court was the meaning of this Court's decision in Alessi v. Raybestos-Manhattan, 451 U.S. 504, 101 S. Ct. 1895, 68 L.Ed.2d 402 (1981). Both parties recognized that Alessi permitted the offset, or integration, of certain worker's compensation benefits against pension benefits. See Alessi, 451 U.S. at 520, 101 S.Ct. at 1904. Oscar Mayer asserted that this holding was absolute and any worker's compensation benefit, regardless of its character, could be offset. Pet. App. 129. Huppeler argued to the contrary, contending that only worker's compensation awards in the nature of wage replacement could be offset, while fixed worker's compensation awards designed to compensate for permanent bodily impairment could not. Id. Huppeler noted the rule, set forth by this Court in Alessi, that to be properly offset the worker's compensation benefits at issue had to "correspond to benefits available under the pension plan." Alessi, 451 U.S. at 520, 101 S.Ct. at 1904.

This correlation rule had been created by Internal Revenue Service (IRS) regulations and rulings, which emphasized that a plan could not remain a qualified pension plan "if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses...." 26 C.F.R. §1.401-1(b) (1) (i) (1994)

(emphasis added). In its leading decision in this area the IRS stated

> There are many types of benefits under public programs that do not lend themselves to integration with private pension plan benefits. Thus a correlated retirement system could not exist. Only those programs which provide benefits that may be provided under a qualified pension plan may be used as an offset since only then could a correlated retirement system exist....

Rev. Rul. 78-178, 1978-1 Cum. Bull. at 118, citing 26 C.F.R. §1.401-1(b) (1) (i) (emphasis added). This Court itself, in Alessi, noted that "[t]he IRS also has not permitted integration with reimbursement for medical expenses or with fixed sums made for bodily impairment because such payments do not match up with any benefits available under a pension plan qualified under the Internal Revenue Code and ERISA." Alessi, 451 U.S. at 520-521, 101 S.Ct. 1904-1905, citing Rev. Rul. 78-178, 1978-1 Cum. Bull. at 118 (emphasis added).

The District Court stated that it found Alessi ambiguous, and it found that this "ambiguity is intensified" with each portion of Alessi that it reviewed. Pet. App. 131. The Court found no relief in reviewing the opinions of no less than four Circuit Courts of Appeal who had decided cases since Alessi, since those opinions are entirely in conflict. Pet. App. 132-134.[1] The District Court ultimately

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[1] Each of these cases will be briefly discussed below with reference to the Seventh Circuit's resolution of the case.

did not directly address the correlation rule. Instead, it resolved the case on an entirely different ground, concluding that Huppeler's claim was preempted pursuant to 29 U.S.C. §1144(a). Pet. App. 134.

On appeal to the Seventh Circuit Huppeler asked the Court to review this rationale. With all due respect to the District Court, Huppeler noted that the correlation rule was a principle of federal law set forth by the IRS in published regulations and decisions. See 26 C.F.R. §1.401-4(b) (1993) (federal statutes and regulations "establish an integrated and correlated retirement system...."); Rev. Rul. 78-178, 1978-1 Cum. Bull. at 118. Therefore, the District Court's conclusions regarding preemption of state law failed to address the question at hand.

As he had before the District Court, Huppeler continued to demonstrate the applicability of the correlation rule. Huppeler noted that the United States had submitted an amicus curiae brief in Alessi on behalf of the IRS. Brief of the United States as Amicus Curiae, Alessi v. Raybestos Manhattan, U.S. Supreme Court Docket Nos. 79-1943 and 80-193 (February, 1981), at 22-23, n. 13. While supporting the use of integration of worker's compensation under some circumstances, the Solicitor General was careful to maintain the vitality of the correlation rule, stating that

> ...to the extent that a workers' compensation award reimburses the worker for medical expenses or provides fixed payments for bodily impairment, the Commissioner [of Internal Revenue] does not permit such awards to be used to offset pension benefits because such awards may not be provided under a qualified pension plan.

Brief of the United States, at 22, n. 13, citing Rev. Rul. 78-178, 1978-1 Cum. Bull. at 118 (emphasis added). Because the IRS continued to adhere to the correlation rule, "in no sense does the Commissioner's offset policy put an injured employee in a worse position than a healthy employee with comparable years of service under the pension plan." Brief of the United States, at 23, n. 13.

The Seventh Circuit rejected the preemption analysis of the District Court, and addressed the correlation rule. The Court rejected Oscar Mayer's contention that Alessi sanctioned offsets for any and all offsets of worker's compensation benefits. "...[S]ome of the [Supreme] Court's reasoning [in Alessi] suggested that this determination might turn on the nature of the workers' compensation award." Pet. App. 105. Throughout its subsequent analysis, the Seventh Circuit repeatedly noted the intractable problems lower courts have had in interpreting Alessi and the applicable regulations. Construing the language of Alessi with the applicable regulations "has been the source of some confusion in the lower courts." Pet. App.105. The Seventh Circuit was ultimately forced to seek meaning in Alessi's footnotes, which were themselves "unclear." Pet. App. 112. Ultimately, the Seventh Circuit frankly conceded that it had "difficulty...understanding Alessi's teachings." Pet. App. 113.

The Seventh Circuit looked to its sister Circuits for assistance in determining the meaning of Alessi, but found only confusion. The Fourth and Sixth Circuits have apparently adopted Oscar Mayer's position, disregarding the correlation rule and "summarily" concluding that all worker's compensation awards could be offset. Pet. App. 113-114, citing PPG Industries v. Crews, 902 F.2d 1148

(4th Cir. 1990), and Kapuscinski v. Plan Administrator, 658 F.2d 427 (6th Cir. 1981). The Seventh Circuit flatly refused to adopt the rationale of those cases, however, because "[n]either court...looked at the nature of the benefit, or examined the language in Alessi that discusses the correlation between pension benefits and collateral benefits." Pet. App. 114.

The Seventh Circuit found that the Ninth and Second Circuits had squarely addressed the correlation rule. Pet. App. 114-115. The Seventh Circuit noted the development of a line of case law in the Ninth Circuit which culminated with Losada v. Golden Gate Disposal Co., 950 F.2d 1395 (9th Cir. 1991). In that case, the Ninth Circuit specifically adopted the correlation rule, quoting directly from Rev. Rul. 78-178 and Alessi.

> The IRS also has not permitted integration with reimbursement for medical reimbursement or with fixed sums made for bodily impairment because such sums do not match up with any benefits available under a pension plan qualified under the Internal Revenue Code and ERISA.

Losada, 950 F.2d at 1398, n. 2 (emphasis in original). Holding that the settlement of a permanent partial injury claim constituted "compensation for bodily impairment" under California worker's compensation law, the Court found an impermissible forfeiture in violation of 29 U.S.C. §1053(a) and the correlation rule. Losada, 950 F.2d at 1400. Similarly, the Second Circuit has complied with the IRS' correlation rule and examined the nature of the worker's

compensation award at issue. Reska v. Pension Plan of Bethlehem Steel Corp., 848 F.2d 372, 375 (2d Cir. 1988).

Faced with divided precedent, the Seventh Circuit conceded that it was "inclined to follow the more thorough analysis offered by the Ninth Circuit [in Losada]." Pet. App. 116. It resolved to extend deference to the IRS' position on integration, based on its understanding of Alessi. Pet. App. 118. Relying exclusively on the language of 26 C.F.R. §1.411(a) -4(a), however, the Seventh Circuit concluded that it permitted offsets of all worker's compensation awards regardless of their character. Pet. App. 118-120.

In doing so, the Seventh Circuit was forced to admit that it was disregarding the correlation rule (Pet. App. 119),which is itself a product of IRS regulations and decisional law. See Rev. Rul. 78-178, 1978-1 Cum. Bull. 118; 26 C.F.R. §1.401-4(b) (1994).

It also recognized the devastating consequences of its decision.

> This is a very harsh result. The plaintiffs have suffered permanent hearing loss, and are entitled to no remedy. Matters are perhaps made even worse by the fact that there is some language—in the Supreme Court's opinion in Alessi, in some of the Treasury Regulations (particularly Rev. Rul. 78-178) and in Supreme Court briefs submitted by the United States government—indicating that precisely this result would not be reached. Moreover, the conclusion that we come to is hard to justify as a matter of either policy or economics.

> The correlation rule seems designed to prevent double-counting (by not allowing an employee to receive lost wages both in workers' compensation benefits and in his pension), which is obviously a sensible goal. But by permitting all offsets, we leave the employee who is injured to bear, by himself, the full cost of his injury. This strikes us as indefensible on a common sense or rough justice basis.

Pet. App. 120 (emphasis in original).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that there are two reasons why Huppeler's Petition for Certiorari must be granted: (1) the Seventh Circuit's decision conflicts with decisions of this Court and with decisions in other Courts of Appeal; and (2) the Seventh Circuit's decision raises legal issues of national significance which should be resolved by this Court.

I. IN DISREGARDING THE IRS' CORRELATION RULE, THE SEVENTH CIRCUIT RECOGNIZED THAT ITS DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF NUMEROUS COURTS OF APPEALS.

Huppeler's Question Presented No. 1 relates to the correlation rule. In concluding that worker's compensation awards for permanent bodily impairment could be offset against pension benefits, the Seventh Circuit recognized that its decision directly conflicted with decisions of this Court and the decisions of several Circuit Courts of Appeals.

This Court has stated that it will likely exercise its discretion to hear a case when "a United States court of appeals...has decided a federal question in a way that conflicts with applicable decisions of this Court...." Sup. Ct. R. 10.1(c). As lower courts rarely state outright that they are departing from this Court's decisions, this Court grants certiorari where there is an arguable or likely conflict between its past decisions and that of the Court of Appeals. See e.g. Chemical Waste Management, Inc. v. Hunt, ____ U.S. ____, 112 S.Ct. 2009, 2012, 119 L.Ed.2d 121 (1992); Foucha v. Louisiana, ____ U.S. ____, 112 S.Ct. 1780, 1783, 118 L.Ed. 437 (1992).

The language of Sup. Ct. R. 10.1(c) and the supporting cases is applicable on the present facts. The Seventh Circuit itself concedes that "there is some language...in the Supreme Court's opinion in Alessi...indicating that precisely this result would not be reached." Pet. App. 120 (emphasis in original). Thus, there is really no issue as to whether its decision 'arguably' or 'likely' conflicts with Alessi. See Hunt, 112 S.Ct. at 2012; Foucha, 112 S.Ct. at 1783. It does in fact conflict with Alessi, as the Seventh Circuit admitted. Pet. App. 120.

The existence of a split in the Circuit Courts of Appeal further demonstrates a fundamental need for this Court to exercise its supervisory function. Sup. Ct. R. 10.1(a) states that a writ should be granted "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter...."

Members of this Court have similarly emphasized the importance of this Court's responsibility to provide uniform interpretation of federal law. Speech of Hon. John M. Harlan, Manning the Dikes: Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States, (Assoc. of the Bar of New York City: 1958) (Manning the Dikes). Justice Harlan stated that this Court most often grants the writ where "there is a conflict of decisions among the lower federal courts on a point of federal law. In such a case certiorari will usually be granted to resolve the conflict, for uniformity in the law throughout the federal system is clearly something of prime importance." Manning the Dikes, at 18-19. This Court's decisions are in accord. See Braxton v. U.S., 500 U.S. 344, 111 S.Ct. 1854, 1857, 114 L.Ed.2d

385 (1991) (calling resolution of conflicting Circuit Courts of Appeals decisions concerning federal law "[a] principal purpose for which we use our certiorari jurisdiction....") U.S. v. Burke, ____ U.S.____, 112 S.Ct. 1867, 1870, 119 L.Ed. 2d 34 (1992); Wyatt v. Cole, ____ U.S. ____, 112 S.Ct. 1827, 1829, 118 L.Ed.2d 504 (1992).

The language of Sup. Ct. R. 10.1(a) and the supporting authorities is controlling on the present facts. As noted above, at least four Circuit Courts of Appeal have considered the offset of worker's compensation awards against pension benefits since this Court's 1981 decision in Alessi. The resulting decisions are hopelessly in conflict. The Ninth Circuit, in a line of cases[2] culminating with Losada v. Golden Gate Disposal Co., 950 F.2d 1395, 1400 (9th Cir. 1991), has maintained the IRS' correlation rule, rejecting the integration of worker's compensation benefits which are "fixed sums made for bodily impairment because such payments do not match up with any benefits available under a pension plan qualified under the Internal Revenue Code." Losada, 950 F.2d at 1398, n. 2 (emphasis omitted). See Pet. App. 115. The Second Circuit is in accord. Reska v. Pension Plan of Bethlehem Steel Corp. 848 F.2d 372, 375 (2d Cir. 1988). In contrast the Fourth and Sixth Circuits have apparently held, in violation of the IRS' correlation rule, that any worker's compensation award can be integrated regardless of its character. See Pet. App. 113-114, citing PPG Industries v. Crews, 902 F.2d 1148 (4th Cir. 1990) and Kapuscinski v. Plan Administrator, 658 F.2d 427 (6th Cir.

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[2] As noted by the Seventh Circuit, these prior Ninth Circuit cases are Server v. Interpace Corp., 657 F.2d 1115 (9th Cir. 1981), and Employee Benefits Committee v. Pascoe, 679 F.2d 1319 (9th Cir. 1982). Pet. App. 114-115.

1981). However, the Seventh Circuit noted that these holdings were reached "summarily" and failed to examine "the language in Alessi that discusses the correlation between the pension benefits and the collateral benefits." Pet. App. 114.

Sup. Ct. R. 10.1(a) states that the writ is likely to be granted "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter...." As noted above, it is impossible to reconcile the Ninth and Second Circuit's decisions in Losada and Reska with the summary conclusions of the Fourth and Sixth Circuits in Crews and Kapuscinski. The Seventh Circuit said so repeatedly. "The courts of appeals have divided in figuring out what emerges from Alessi." Pet. App. 113. The Court continued,

> ...though all of the courts have thus far agreed that the central feature of Alessi is its discussion of what Congress intended in enacting ERISA (to leave in place the then-existing IRS regulations), they have divided over how to understand the Court's interpretation. This disagreement does not surprise as given the difficulty that we, too, have had in understanding Alessi's teachings.

Pet. App. 113 (emphasis added). In short, there is an irreconcilable conflict in the Circuits on this issue. As Justice Harlan noted, "... [u]niformity in the law throughout the federal system is clearly of prime importance...." Harlan, Manning the Dikes, at 18-19.

Because the decision below conflicts with Alessi, and because the Circuit Courts of Appeals are sharply divided

among themselves in interpreting Alessi, it is respectfully submitted that this Court should grant the writ.

II. THE DECISION BELOW PRESENTS IMPORTANT AND UNRESOLVED ISSUES OF LAW REQUIRING RESOLUTION BY THIS COURT, PARTICULARLY BECAUSE IT THREATENS TO LEAVE PERMANENTLY INJURED EMPLOYEES WITHOUT A REMEDY.

This Court's rules state that another consideration in granting certiorari is when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court...." Sup. Ct. R. 10.1(c). The Court has regularly applied this principle in granting certiorari. See Burson v. Freeman, ____ U.S. ____, 112 S.Ct. 1846, 1849, 119 L.Ed.2d 5 (1992); Detroit Edison Co. v. NLRB, 440 U.S. 301, 304, 99 S.Ct. 1123, 1125, 59 L.Ed.2d 333 (1979); International U., United A., A & A. I.W. v. Schofield, 382 U.S. 205, 207, 86 S.Ct. 373, 376, 15 L.Ed.2d (1965).

The fundamental consideration in applying this rule is the "public importance" of the legal issue raised. E.B. Prettyman, Petitioning the United States Supreme Court—A Primer for Hopeful Neophytes, 58 Va. L. Rev. 582, 601 (1965). See also Stern & Gressman, Supreme Court Practice (6th ed. BNA: 1986), at 213. As Justice Harlan stated it,

> The cornerstone of a petition for certiorari in a federal case is a showing that the question sought to be reviewed is one of general importance. Review by certiorari is in the interest of the law, its

> appropriate exposition and enforcement, not for the mere interest of the litigants.

Manning the Dikes, at 18 (emphasis in original, quotations omitted).

The language of Sup. Ct. R. 10.1(c) and the supporting authorities is applicable in two respects. First, this Court should resolve whether the IRS' correlation rule will be applied, or whether Alessi will now be interpreted to permit the offset of any worker's compensation award regardless of its character. Second, if the IRS' correlation rule is to be applied, this Court should clarify whether the character of a worker's compensation award is to be determined as a matter of federal common law or as a matter of applicable state worker's compensation law. It is respectfully submitted that both issues are important questions of law which "should be settled" by this Court. Sup. Ct. R. 10.1(c).

A. The Decision Below Deprives Employees Across the Nation of a Remedy for Their Permanent Injuries.

Prior to this Court's decision in Alessi, the IRS recognized that permitting the offset of any worker's compensation award against a pension plan would work a manifest injustice to injured employees across the nation. The IRS, through the Solicitor General, filed an amicus brief with this Court in Alessi. While that brief was filed in support of the employers' position that some offsets (or integration) were permissible, the IRS was careful to preserve its correlation rule. While temporary worker's compensation benefits were in the nature of wages and cor-

related against a qualified pension plan, worker's compensation benefits designed to compensate for permanent bodily impairment did not correlate and could not be offset. "...[T]o the extent that a worker's compensation award reimburses the worker for medical expenses or provides fixed payments for bodily impairment, the Commissioner [of Internal Revenue] does not permit such awards to be used to offset pension benefits because such awards may not be provided under a qualified pension plan." (emphasis added). Because of the application of the correlation rule, the Solicitor General was able to argue that "in no sense does the Commissioner's policy put an injured employee in a worse position than a healthy employee under the pension plan." Brief of United States, at 23, n. 13.

As the Seventh Circuit recognized, when the IRS' correlation rule is abandoned and all worker's compensation awards (regardless of their character) are offset, employees with permanent injuries are left in a far worse position than other employees in the same plan who have not suffered permanent injuries. Employees like Huppeler receive exactly the same amount of money as employees who have never suffered a permanent injury. In essence, permanently injured employees receive no compensation whatsoever for their injuries. As the Seventh Circuit recognized below, the failure to apply the correlation rule means that Huppeler is forced "to bear the full cost of his injury. This strikes us as indefensible on a common sense or rough justice basis." Pet. App. 120. The Seventh Circuit recognized that this is "a very harsh result," and that "plaintiffs have suffered permanent hearing loss, and are entitled to no remedy." Id.

This injustice is not limited to the Petitioners in this case. Many thousands of employees suffer permanent work-related injuries every year. The dollar compensation stemming from those injuries is severely limited by state law (see e.g. sec. 102.555, Wis. Stats.) considering that we are talking about permanent, irreversible damage to the body. To permit these limited monies to be subtracted from pension benefits is to leave thousands of permanently injured employees without any remedy whatsoever. The numerous appellate cases which have arisen since Alessi around the nation demonstrate that the problem is national in scope. Direction from this Court, on an issue that has both divided the Circuits and had catastrophic effects on injured employees across the country, clearly would be "in the interest of the law, [and] its appropriate exposition and enforcement." Harlan, supra., at 18.

The Seventh Circuit, after much debate, refused to act to prevent this injustice.

The Seventh Circuit ultimately determined to defer to the IRS' interpretation consistent with Chevron, U.S.A. v. NRDC, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Pet. App. 117. This was a position supported by Huppeler, not Oscar Mayer, below. The Seventh Circuit concluded that the case was governed by 26 C.F.R. §1.411(a) -4(a). That regulation provides that

> ...nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or any other Federal or State law and which are taken into account in determining plan benefits.

The Seventh Circuit held that since this regulation references integration of benefits under "State law," any offset was permissible and its inquiry was at an end. Pet. App. 119. The Seventh Circuit said that the "only occasion" on which it had been suggested that the correlation rule applied to forfeitures was in the United States' amicus brief in Alessi, and that this reference could be discounted. Pet. App. 119.

The rapidity with which the Seventh Circuit reached this conclusion completely contradicts its prior analysis of the confusion and disagreement in the Circuit Courts of Appeal resulting from Alessi. In fact, 26 C.F.R. §1.411(a) -4(a) itself explicitly references the correlation rule when it states that benefits under State law can be offset only when they are benefits "which are taken into account in determining plan benefits" (emphasis added). 26 C.F.R. §1.401-1(b) (1) (i) similarly states that "a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization or medical expenses...." (emphasis added). See also 26 C.F.R. §1.401-4(b), which notes that variations in benefits will be permitted "provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401 [26 U.S.C. §401]." (emphasis added).

The correlation rule found at 26 C.F.R. §1.401-1(b)(1)(i) is explicitly referenced in 26 C.F.R. 1.411(a) -4(a), contrary to the Seventh Circuit's conclusion. Further, as the Seventh Circuit recognized elsewhere in its opinion, the correlation rule has been applied with regard to forfeiture issues in the past in places other than the United States' amicus brief

in Alessi. See Pet. App. 109-110, at n.3, noting Rev. Rul. 78-178, 1978 Cum. Bull. at 118. Other Revenue Rulings have also discussed the correlation rule and forfeitures. See Rev. Rul. 84-45, 1984-1 Cum. Bull. 115.[3] Without engaging in a full blown argument on the merits, it is clear that the legal issue in dispute is substantial and in need of resolution by this Court.

B. If this Court Restores the IRS' Correlation Rule, It Should Further Resolve Whether the Character of a Worker's Compensation Award is to be Determined with Reference to Federal Common Law or Applicable State Law.

A second issue, identified as Huppeler's Question Presented No. 2, is of substantial importance and requires clarification by this Court. Assuming this Court rules in Huppeler's favor on the forfeiture issue, the next question to arise will be how the character of the worker's compensation award should be determined. Both the Ninth Circuit in Losada and the Second Circuit in Reska looked to State law to determine whether the worker's compensation award was in the nature of wage replacement or for permanent bodily impairment. Losada, 950 F.2d at 1400; Reska, 848 F.2d at 375. However, the Seventh Circuit held

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[3] Huppeler would also respectfully direct the Court's attention to Rev. Rul. 68-243, 1968-1 Cum. Bull. 157. This revenue ruling had been relied upon by Oscar Mayer as broadly supporting the offset of worker's compensation benefits regardless of their character. Rev. Rul. 68-243 has recently been overruled by the IRS, however. See Rev. Rul. 93-87, 1993-2 Cum. Bull. 124.

> We are less than certain why... the characterization of the benefits as either for 'wage replacement' or 'bodily impairment' should turn on how state law describes workers' compensation in general, rather than decided by the federal court in individual cases. The argument for case-by-case [federal] determination seems particularly powerful in light of ERISA's broad preemption of all state laws that 'relate to any employee benefit plan.'

Pet. App.116, at n.6, quoting 29 U.S.C. §1144(a).

The Circuits are thus split yet again on the issue of whether state worker's compensation law or federal common law should be used to characterize the worker's compensation benefits at issue. Therefore, Huppeler respectfully asks that this Court, after restoring the IRS' correlation rule, determine whether federal common law or state worker's compensation law is the proper source of law to determine the character of a worker's compensation award.

CONCLUSION

In this Petition for Certiorari, Huppeler has demonstrated two principles of law applicable on the present facts: (1) the decision below conflicts with this Court's decision in Alessi, and with the decisions of multiple Courts of Appeal; and (2) the decision below raises a question of national importance because it threatens to leave permanently injured employees without a remedy.

For these reasons, it is submitted that the petition must be granted.

Respectfully submitted,

RICHARD V. GRAYLOW, ESQ.
Counsel for Petitioners
Lawton & Cates. S.C.
P.O. Box 2965
Madison, WI 53701-2965
(608) 256-9031

JOHN C. TALIS, ESQ.
Counsel of Record
Lawton & Cates, S.C.
P.O. Box 2965
Madison, WI 53701-2965
(608) 256-9031

APPENDIX TO PETITION

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In the
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For the Seventh Circuit

No. 93-3765

ROBERT A. HUPPELER, EDWIN C. MAGLI and ELLWOOD SANDMIRE

Plaintiffs-Appellants,

v.

OSCAR MAYER FOODS CORPORATION, Plan Administrator, and Pension Plan No. 1,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 93 C 370—John C. Shabaz, Judge.

Argued May 13, 1994—Decided August 8, 1994

Before CUDAHY, KANNE and ROVNER, Circuit Judges

CUDAHY, Circuit Judge. Robert Huppeler began working for Oscar Mayer in its Madison, Wisconsin plant in 1964. His job required that he run (and work alongside) noisy machinery used in meat processing. After working for Oscar Mayer for more than twenty-five years, Huppeler's

doctors told him in 1990 that he had suffered a 21.1 percent permanent partial bilateral hearing loss. He took early retirement in January 1992.

Under Wisconsin law, Huppeler was barred from bringing a tort action against Oscar Mayer; his exclusive remedy was the right to recover compensation under the state's Worker's Compensation Act. *See* Wis. Stat. § 102.03 (2). He thus sought recovery before the Wisconsin Department of Industry, Labor and Human Relations, which on July 13, 1992 awarded him $6,562.62.

But in May 1993 Huppeler received a letter from the Employee Benefits Manager at Oscar Mayer, telling him that every dollar he received in workers' compensation benefits would be subtracted from his pension. He would therefor not receive his monthly pension benefits, which amounted to approximately $350 a month, for the next 19 months. All of this was pursuant to Pension Plan No. 1—which was negotiated between Oscar Mayer and Huppeler's union—and provided that pension benefits would be offset, dollar for dollar, from any workers' compensation award an employee might receive, save for payment for injury for the loss of a body member. Despite the common sense similarity between hearing loss and "loss of a body member," Huppeler does not contend that his loss of hearing falls within the plan's "loss of a body member" exception to the offset for workers' compensation benefits; there is no claim that the plan was improperly administered.

Edwin Magli and Ellwood Sandmire also worked at Oscar Mayer, and following their retirement found that they

too had suffered permanent hearing loss. Neither filed for workers' compensation benefits, however, figuring that they had nothing to gain by it; whatever they received would just come out of their pensions. They, along with Huppeler, sued Oscar Mayer, claiming that the offset clause in the pension plan represents a forfeiture, and is therefore forbidden under the anti-forfeiture provision for the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1053(a). The district court entered summary judgment in Oscar Mayer's favor and the plaintiffs appeal.

I.

"The central problem to which ERISA is addressed is the loss of benefits previously promised." John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 82 (1990). ERISA does not concern itself with the *amount* of benefits promised. In negotiating the size of the pension on retirement, employers and employees are left free to agree to a large pension, a small pension or no pension. But whatever the size, once those benefits have "vested," ERISA does not allow the benefits to be "forfeited." "Each pension plan shall provide that an employee's rights to his normal retirement benefit is non-forfeitable upon the attainment of normal retirement age." 29 U.S.C. §1053(a). The Supreme Court has accordingly noted that the primary motivating purpose of ERISA was to ensure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). Commentators have observed that "ERISA might easily

have been titled the Pension Benefits Antiforfeiture Act." Langbein & Wolk, *Pension and Employee Benefit Law, supra*, at 83.

This aspect of ERISA—like much else in our nation's pension policy—is undeniably paternalistic, *see generally,* Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory,* 58 U. Chi. L. Rev. 1275 (1991). The effect of ERISA's anti-forfeiture contracting "for a pension plan whose benefits are made contingent beyond ERISA's permitted forfeiture provision is to forbid an employee and an employer from contracting "for a pension plan whose benefits are made contingent beyond ERISA's permitted forfeiture periods." Langbein & Wolk, *Pension and Employee Benefit Law, supra*, at 91. The question presented in this case is one that has caused division among the various courts of appeals: whether offsetting pension benefits by workers' compensation payments made to an employee, where the payment compensates for "bodily impairment" that the employee suffered, is forbidden by ERISA's anti-forfeiture provision.

II.

Our examination of this question begins—and, according to Oscar Mayer, should end—with the Supreme Courts decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). The *Alessi* Court addressed whether, generally speaking, offsetting the receipt of workers' compensation awards from an employee's pension benefit amounts to a forbidden forfeiture. The Court held that it does not, and therefore upheld the IRS regulations being challenged. Those regulations provide that "nonforfeitable

rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits." 26 CFR §1.411(a)-4(a). But some of the Court's reasoning suggested that this determination might turn on the nature of the workers' compensation award. The tension between the sweeping language in the regulations the Court upheld, and the more layered reasoning offered by the *Alessi* Court itself, has been the source of some confusion in the lower courts.

The plaintiffs in *Alessi* argued that any offset in pension benefits for a workers' compensation award was an impermissible forfeiture. In rejecting this contention, the Court noted that there exists a distinction between depriving a worker of vested benefits, and defining the content of the benefit that, once vested, cannot be forfeited. *Alessi*, 451 U.S. at 511. But this linguistic twist only goes so far—any contractual provision that called for the forfeiture of benefits could be described as defining the content of nonforfeitable benefits. The Court therefore probed further, attempting to discern whether Congress—in enacting ERISA—sought to nullify contractual language in pension plans providing for an offset for workers' compensation benefits.

A

The Court found "particularly pertinent" the fact that Congress did not prohibit the use of a calculation method—known as "integration"—under which "benefit levels are determined by combining pension funds with other income

streams available to the retired employees." *Id.* at 514. So if, for example, an employee's pension provided that upon his retirement he would receive 65 percent of his salary, and if he was entitled to social security benefits that amounted to 25 percent of his salary, under an "integrated" pension plan, the pension would pay only the differential, here 40 percent of the employee's salary.

The *Alessi* Court noted that ERISA did not forbid integration. Rather, in prohibiting only integration "based on increases in Social Security or Railroad Retirement benefits authorized after ERISA took effect," Congress "acknowledged and accepted [the general practice of integration], rather than [prohibited] it." *Id.* at 516.[1]

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[1] But integration based on "unreasonable projections of an employee's social security benefits—rather than actual benefits—violates ERISA. *See Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975 (4th Cir. 1987).

Note that the integration of social security benefits will tend to favor more highly compensated employees. The purpose of integration is generally to ensure that total retirement income, pension benefits plus Social Security, replaces the same percentage of all employees' salary. But because Social Security will replace a greater percentage of pay for lower-paid employees, an integrated plan will provide these lower paid employees with lower pension benefits. While integration based on actual social security benefits does not violate ERISA's prohibition against discrimination in favor of highly compensated employees, the *Dameron* court concluded that integration based on "unreasonable projections" of social security benefits does violate this stricture. 815 F.2d at 979-80. *See* Barbara J. Coleman, *Primer on ERISA* 49 (4th ed. 1993).

Because the rationale for allowing integration—"promoting a system of private pensions by giving employers avenues for cutting the cost of their pension obligations," 451 U.S. at 517—applies to all types of offsets to pension benefits, the Court hinted that by allowing integration Congress may have condoned all other offsets. But it stopped short of such a holding. "An argument could be advanced," the Court recognized, "that Congress approved integration of benefits only with the federal benefits expressly mentioned in the Act." *Id.* at 517. It therefore found the analogy to integration of Social Security benefits nondispositive, and looked further for evidence of Congress' intent regarding workers' compensation benefits.

B

The Court therefore looked to the IRS rulings the predated ERISA the addressed what type of integration would be permissible in a "qualified pension plan." The Court considered these rulings a reliable indicator of Congress' intent because "when it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect."[2] *Alessi*, 451 U.S. at 519. These rulings, the Court said, "include workers' compensation offsets within the ambit of permissible integration." *Id.* at 520. But while Oscar Mayer would have us stop there, the Court went on to qualify this conclusion.

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[2] Under ERISA, qualified pension plans receive favorable tax treatment. An employer can deduct its contributions to the pension trust in the year in which the contributions are made, the earnings

(Footnote continued on following page)

The IRS's pre-ERISA rulings, which focus on the prohibition on discrimination rather than forfeiture per se, the Court observed, "base their allowance of pension payment integration on three factors: the employer must contribute to the other benefit funds, these other funds must be designed for general use, and the benefits they supply must correspond to benefits available under the pension plan." *Id.* It is the third factor—that the collateral benefits must correspond with pension benefits—that proves problematic.

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2 *continued*

on the trust's principal are not taxed, and the employee is not taxed until the benefits are distributed. But satisfaction of the anti-forfeiture principle is a statutory requirement for qualification. A qualified plan therefore must provide that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 26 U.S.C. §411(a). This language mimics the anti-forfeiture language at issue here—that of 29 U.S.C. §1053(a).

But even before ERISA, qualified pension plans received favorable tax treatment, and the IRS had promulgated regulations governing such plans. those regulations of course pre-dated ERISA's anti-forfeiture language, and were rather an interpretation of 26 U.S.C. §401(a), which forbids discrimination in favor of company officers, shareholders, or highly compensated employees. While integration might be seen as discriminatory, *see* note 1, Section 401(a)(5), provides that a plan is not discriminatory because of differences in benefits "because of any retirement benefits created under State or Federal Law." And the IRS regulations interpreting that provision—the ones on which the *Alessi* court relied—said that a plan is not discriminatory by virtue of its integration with Social Security funds and other benefits publicly available. These are the regulations to which the Court turned after concluding that Congress, in enacting ERISA, knew of and did not venture to change the existing regulations, and therefore implicitly approved them.

The *Alessi* Court explained that question further. "The IRS employed these [three] considerations in approving integration with workers' compensation benefits. In contrast, the IRS has disallowed offsets of pension benefits with damages recovered by an employee through a common-law action against the employer. The IRS also has not permitted integration with reimbursement for medical expenses or with fixed sums made for bodily impairment because such payments do not match up with any benefits available under and ERISA." *Id.* at 520-21 (citing Rev. Rul. 69-421, Part 4(j), 1969-2 Cum. Bull. 72; Rev. Rul. 68-243, 1968-1 Cum. Bul. 157). And, the Court noted, the legislative history suggests that Congress, in enacting ERISA, "embraced such IRS rulings," albeit "[w]ithout speaking directly of its own rationale." *Id.* at 521. *See*, H.R. Conf. Rep. No.92-1280, 93rd Cong. 2d Sess., 277 (1974), U.S. Code Cong. & Admin. News, p. 5038.

The implication of this is that Congress knew what the IRS was doing before ERISA, and this understanding—as reflected in the IRS's pre-ERISA rulings, was statutorily enacted by the passage of ERISA.[3] But there is also another

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[3] The Court's reliance on the IRS's Rev. Rul. 78-178, 1978-1 Cum Bul. 118, raises some interpretive difficulty. That ruling, like the other rulings to which the Court looked, is an interpretation of 26 CFR §1.401-1, which in turn interprets §401(a)(5) of Internal Revenue Code. Section 401(a)(5) is the pre-ERISA provision of the tax code that forbids discrimination in qualified pension plans. But unlike the pre-ERISA interpretations, it cannot plausibly be contended that Congress–in enacting ERISA in 1974–implicitly approved of Rev. Rul. 78-178 (which of course *followed* ERISA's

(Footnote continued on following page)

rationale reflected in the opinion, that of deference to agency interpretation. This latter rationale emerges from the Court's assertion (though relegated to a footnote) that "we must defer to the consistent agency position that is itself reasonable and consonant with the Act." *Id.* at 520-21 n. 16. But despite this assertion, in its explication of the statute the Court does not place explicit reliance on the IRS regulations interpreting ERISA, the very regulations whose validity were being challenged in *Alessi* itself. *Alessi* is therefore

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[3] *continued*

passage). But Rev. Rul. 78-178 is generally consistent with the IRS's pre-ERISA pronouncements, and we read the Court in *Alessi* to say that Congress approved of this general regime.

But further difficulty is introduced by the fact that Rev. Rul. 78-178 contains the broadest language setting out a "correlation rule," under which only benefits that "correspond to benefits available under the pension plan" may be integrated. "[T]he benefits payable under State or Federal programs because of sickness and maternity, and which include cash benefits and medical services, may not be used as an offset to pension plan benefits because such benefits may not be provided under a qualified pension plan." Rev. Rul. 78-178, 1978-1 Cum. Bul. 118.

And matters are made perhaps more complicated still by the fact that the United States, in its *amicus* brief before the Supreme Court in *Alessi*, asserted that under Rev. Rul. 78-178, "to the extent that a workers' compensation award reimburses the worker for medical expenses or provides fixed payments for bodily impairment, the Commissioner does not permit such awards to be used to offset pension benefits because such awards may not be provided under a qualified pension plan." Brief of United States as amicus curiae at 22 n. 13, *Alessi*, 451 U.S. 504 (Nos. 79-1943 and 80-193) (Feb. 5, 1981). Thus argued the government, the "Commissioner's offset policy [does not] put an injured employee in a worse position than a healthy employee with comparable years of service under the pension plan." *Id.* at 22-23 n.13.

subject to either of these two interpolations, both of which are a bit problematic.

The first interpretation is that the case is a straightforward statutory interpretation of ERISA's anti-forfeiture provision, and that the Court read that provision—in accordance with the IRS's pre-ERISA practice—to adopt some form of correlation rule. This correlation rule, in a rough sense, can be seen as a sensible attempt to avoid double-counting. Where collateral benefits "correspond to benefits available under the pension plan," allowing the employee to receive both the pension and the collateral benefits would let the employee collect twice. On the other hand, medical expenses and sums for "bodily impairment" do not match up, would not represent double counting, and therefore cannot be integrated.[4] On this reading of *Alessi*, Congress, in enacting ERISA, adopted this rule. But the problem with reading *Alessi* this way is that the Court did not look to see whether the benefits at issue in the *Alessi* case itself represented wage replacement or bodily impairment. This would have been the logical next step had the opinion held that ERISA statutorily enacted the correlation rule.

Instead, the Court simply noted that one of the plans at issue does not offset deductions "for medical expenses or

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[4] But this principle holds true only in a general sense. For example, tort recoveries cannot be integrated, though part of the damages in a tort suit, wages the employee could not earn because his injury forced him to retire prematurely, will match up with pension benefits.

fixed payments for bodily impairment," and that the other plan, though "silent on this point," is "certainly subject to IRS regulation." *Id.* at 721 n.17. And recognizing that workers' compensation benefits could well be seen as analogous to tort judgments, the Court, in a footnote, ventured to explain why the IRS might choose to treat the two forms of compensation differently. The IRS, the Court explained, "may have concluded that workers' compensation is as much an income maintenance program, responding to wage loss, as it is remuneration for injury, and therefore it may be integrated with pension benefits to the advantage of the entire employee group." *Id.* at 520 n.16.

And further, the Court notes, "we must defer to the consistent agency position that is itself reasonable and consonant with the Act." *Id.* at 520-21 n.16. This remark points to a second possible interpretation of *Alessi*, that the Court simply deferred to the IRS's interpretation of ERISA. We infer—though it is perhaps unclear—that the "consistent agency position" that the Court is talking about is the one expressed at 26 C.F.R. §1.411(a)—the interpretation of ERISA whose validity it was then considering. The argument for the "agency deference" reading of Alessi is strengthened further by the fact that ERISA expressly delegates to the Secretary of the Treasury the authority to prescribe regulations regarding "minimum vesting standards," 29 U.S.C. §1202(c), out of which the anti-forfeiture requirement emerges. On the other hand, the *Alessi* Court makes no mention of this express delegation.

III.

The courts of appeals have divided in figuring out what emerges from *Alessi*. But, interestingly, all of the courts have focused on the Court's interpretation of ERISA itself. None have thus far read *Alessi* simply to defer to the IRS's interpretation of an ambiguous statute.

But through all of the courts have thus far agreed that the central feature of *Alessi* is its discussion of what Congress intended in enacting ERISA (to leave in place the then-existing IRS regulations), they have divided over how to understand the Court's interpretation. This disagreement does not surprise us, given the difficulty that we, too, have had in understanding *Alessi*'s teachings.

On the one hand, the Court says that the background IRS rule when ERISA was adopted was that collateral benefits could be offset against pension benefits, as long as the collateral income "correlates" with pension benefits; and that Congress intended to embrace that background rule in enacting ERISA. On the other hand, in resolving the case before it, the Court did not ask whether or not the collateral benefits in that case correlated with pension benefits, saying only that in some circumstances such benefits can rationally be understood as correlating.

The Fourth and Sixth Circuits, when presented—after *Alessi*—with the question whether workers' compensation benefits could be offset, summarily said that they could be. *See PPG Industries v. Crews*, 902 F.2d 1148 (4th Cir. 1990); *Kapuscinski v. Plan Administrator*, 658 F.2d 427 (6th Cir.

1981) (concluding that after *Alessi* it is "clear that ERISA allows GM, as administrator of the Pension Plan, to deduct any workers' compensation awards from its retirees' pensions pursuant to the Pension Plan'). Neither court, however, looked at the nature of the benefit, or examined the language in *Alessi* that discusses the correlation between the pension benefits and the collateral benefits.

The Second Circuit, when faced with this same question, went into somewhat greater depth. In *Reska v. Pension Plan of Bethlehem Steel Corp.*, 848 F.2d 372 (2d Cir. 1988), the plaintiff argued that the Court in *Alessi* did not allow integration of all workers' compensation benefits, but only those in the nature of "wage replacement." Edward Reska, who had suffered a 20 percent hearing loss and who had received more than $3,000 in workers' compensation benefits, argued that his benefits could not be offset against his pension plan. But the court found that New York case law made clear that worker' compensation benefits were—in New York—intended to compensate for loss of "presumed or actual earning power." *Id.* at 375. Therefore, the court concluded that it "need not decide whether *Alessi* or relevant IRS rulings apply to *all* or only *some* worker's compensation awards." *Id.* The plaintiff was entitled to no relief even "assuming, *arguendo*, that *Alessi* only applies to workers' compensation awards 'in the nature of wage replacement'." *Id.*

Since *Alessi* only the Ninth Circuit has concluded that offsetting pension benefits for workers' compensation awards—where the award is for bodily impairment rather than wage replacement—amounts to a forbidden forfeiture.

In *Employee Benefits Committee v. Pascoe*, 679 F.2d 1319 (9th Cir. 1982), the pensioners argued that—after *Alessi*—a district court was required to "determine which portion of [their] workers' compensation benefits constitute non-income replacement items, and thus are not subject to offset." Id. at 1321.

But the court in that case refused to remand the matter to the district court for such a determination, noting that under Hawaii law, *all* workers' compensation benefits were intended to serve as compensation for loss of earning power. Because all of the benefits at issue in that case therefore "matched up" with income replacement, a remand was unnecessary.[5] But in *Losada v. Golden Gate Disposal Co.*, 950 F.2d 1395 (9th Cir. 1991), the court found that under California law workers' compensation represented *both* lost income and wage replacement, and that—since the plaintiff took normal retirement—his lost income was presumably negligible. Therefore, the court concluded that the "entire settlement award constitutes compensation for bodily impairment," and could not be offset against pension benefits. *Id.* at 1400.

IV.

If we, like all of the courts before us, believed that the Court in Alessi decided the case based on its interpretation

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[5] The court had previously, in *Server v. Interpace Corp.*, 657 F.2d 1115 (9th Cir. 1981), reversed a pre-*Alessi* district court opinion that forbade all offsets for workers' compensation benefits, and remanded the case to the district court to determine if the pension plan itself permitted such offsets.

of ERISA, we would likely be inclined to follow the more thorough analysis offered by the Ninth Circuit.[6] But both approaches have serious drawbacks. The approach taken by the Fourth and Sixth Circuits ignores the *Alessi* Court's lengthy discussion of the correlation rule. On the other hand, if the Ninth Circuit is correct, the Supreme Court was remiss in *Alessi* for not examining the nature of the workers' compensation benefits at issue there. It also suggests—without saying so expressly—that the IRS regulations that the Court affirmed in *Alessi* are invalid. Lower federal courts in our hierarchical judiciary should of course be loathe to reach a conclusion that carries such an implication.

All of this leads us to question the assumption made by all of the previous courts of appeals—that the result in *Alessi* rested primarily on the details of the Supreme Court's reading of the pre-ERISA IRS regulations. Alternatively, *Alessi* can be read to suggest that it is unclear exactly what Congress intended in enacting ERISA, but that in any case—so long as the IRS regulations interpreting the statute are

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[6] We are less than certain why, under this approach, the characterization of the benefits as either for "wage replacement" or "bodily impairment" should turn on how state law describes workers' compensation in general, rather than decided by the federal court in individual cases. The argument for case-by-case determination seems particularly powerful in light of ERISA's broad preemption of all state laws that "relate to any employee benefit plan." See 29 U.S.C. §1144(a).

reasonable—the court would "defer to the consistent agency position." *Alessi*, 451 U.S. at 520-21 n.16.

It may be unusual that what appears to be the holding of a Supreme Court opinion is not made clear until the end of a lengthy footnote. The "agency deference" view of *Alessi*, we should note, is perhaps colored by the lens of the Supreme Court's subsequent jurisprudence. In particular, this reading of *Alessi* becomes more compelling when that opinion is read in the light cast by the Court's landmark opinion in *Chevron, U.S.A. v NRDC*, 467 U.S. 837 (1984). That decision teaches that when "a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has not, the "court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the courts is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In this case there is no doubt that the statute is ambiguous. ERISA speaks of "forfeiture," but otherwise tells us little. Moreover, ERISA expressly delegates interpretive authority to the Secretary of the Treasury. 29 U.S.C. §1202(c). We therefore suspect, had *Alessi* come along in the post-*Chevron* world, it would have been decided along these lines. But it is of course our role faithfully to apply the Supreme Court's opinions as they are *in fact* written, and the specific teaching of *Alessi* surely takes

precedence over the more general framework set out in *Chevron*.

There is vigorous debate over whether a pre-*Chevron* judicial interpretation of an ambiguous statute can render the statute "unambiguous," and thereby limit the discretion of the relevant agency. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992); *Comment, Precedents Construing Statutes Administered By Federal Agencies After the* Chevron *Decision: What Gives?*, 60 U. Chi. L. Rev. 223 (1993). Perhaps a pre-*Chevron* decision that clarifies a statute, and that does not itself rest on principles of deference to agency interpretation, can render a statute "unambiguous" for *Chevron* purposes, thereby constraining the discretion of the responsible agency. *See generally, Maislin Industries, U.S., Inc. v Primary Steel, Inc.*, 497 U.S. 116 (1990).

But it is clear—as the division in the lower courts demonstrates—that *Alessi* (even if it is itself a construction of the statute, rather than a decision to defer) has not rendered ERISA crystalline. And in any event we believe *Alessi* is best understood as itself deferring to the IRS's interpretation of ERISA. We therefore follow suit, and do the same.

V.

This conclusion renders the ultimate resolution here a reasonably simple matter. *Alessi* represents a decision to delegate interpretive authority to the IRS. The relevant IRS

regulations—the same ones upheld in *Alessi*—say that "non-forfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal State law and which are taken into account in determining plan benefits." *See* 26 CFR §1.411(a)-4(a).

It is true that the IRS has at times spoken of (or hinted at) a "correlation rule." But the revenue rulings in which it has done so (Rev. Rul. 68-243, Rev. Rul. 69-421 & Rev. Rul. 78-178) are all interpretations of a *different* Treasury Regulation (published at 26 CFR §1.401-1, which by itself relates to the anti-discrimination requirement (in 26 U.S.C. §401(a)), not to the anti-forfeiture provisions (in 26 U.S.C. §411 and 29 U.S.C. §1053(a)).

The only occasion that we have discovered in which the IRS has suggested that the correlation rule governs "forfeitures" is the United States' amicus brief in *Alessi*. But a litigation position is not an "agency interpretation." This is especially true when the agency's formal and published interpretation contradicts this position.

The formal and published interpretation of ERISA, to which the IRS has held fast since its promulgation in 1977, *see* 42 Fed. Reg. 42318, 42326 (Aug. 23, 1977), makes clear that integration with benefits "under any ... State law" is permissible. 26 C.F.R. §1.411(a)-4(a). Workers' compensation benefits undeniably fall within the sweep of this language.

According to these regulations, the provision in Oscar Mayer's pension plan, under which Huppeler's pension benefits are reduced a dollar for every dollar he receives in worker's compensation, does not represent an impermissible forfeiture. To the extent that this regulation is inconsistent with what the government represented—in its *amicus* brief in *Alessi*—to be agency practice, it is a matter to be taken up with the IRS. But our role is simply to follow *Alessi*, which has deferred to the IRS's interpretation of ERISA.

VI.

This is a very harsh result. The plaintiffs have suffered permanent hearing loss, and are entitled to no remedy. Matters are perhaps made even worse by the fact that there is some language—in the Supreme Court's opinion in *Alessi*, in some of the Treasury Regulations (particularly Rev. Rul. 78-178) and in Supreme Court briefs submitted by the United States government—indicating that precisely this result would *not* be reached. Moreover, the conclusion that we come to is hard to justify as a matter of either policy or economics. The correlation rule seems designed to prevent double-counting (by not allowing an employee to receive lost wages *both* in workers' compensation benefits and in his pension), which is obviously a sensible goal. But by permitting *all* offsets, we leave the employee who is injured to bear, by himself, the full cost of his injury. This strikes us as indefensible on a common-sense or rough justice basis.

Perhaps the only thing that can be said on behalf of this result is that it does give effect to the agreement reached be-

tween the company and the union in the collective bargaining process. That, and the fact that, at least by our lights, it gets the law right. The correlation rule, whatever its merits, does not appear in 26 C.F.R. §1.411(a)-4(a), which is an authoritative interpretation of ERISA's anti-forfeiture provision. The judgment of the district court is therefore AFFIRMED.

A true Copy:
Teste: _____

Clerk of the United States Court of Appeals for the Seventh District

In the
United States District Court
For the Western District of Wisconsin

ROBERT ALLAN HUPPELER,
EDWIN C. MAGLI and
ELLWOOD SANDMIRE,

Plaintiffs

MEMORANDUM AND ORDER

v. 93-C-370-S

OSCAR MAYER FOODS CORP.,

Defendant.

Plaintiffs Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire commenced this action against defendant Oscar Mayer Foods Corp. ("Oscar Mayer") for declaratory relief, determining that the offset of pension benefits by workers' compensation benefits for partial hearing loss are improper forfeitures prohibited by 29 U.S.C. §1053 (a).

Jurisdiction exists pursuant to 29 U.S.C. §1332.

The action is before this court on five motions. Defendant Oscar Mayer moves the court to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted, for failure to exhaust administrative remedies and for failure to name the proper party defendant. Plaintiffs move for summary judgment in their favor, declaring that offsets of pension benefits by the type of workers' compensation benefits at issue are illegal forfeitures pursuant to 29 U.S.C. §1053. Finally, Oscar Mayer moves for summary judgment, determining that its practice to offset pension benefits by workers' compensation benefits is not prohibited by ERISA.

FACTS

Oscar Mayer employed plaintiffs Huppeler, Magli and Sandmire at its plant in Madison, Wisconsin. While employed all three plaintiffs were members of Local 538 of United Food and Commercial Workers International Union ("Union"). As members of the union they were covered by Pension Plan 1 ("Pension Plan") sponsored by Oscar Mayer and negotiated between Oscar Mayer and the Union. Oscar Mayer is the administrator of said Plan which provides benefits for normal retirement, early retirement and disability retirement. Pursuant to the terms of a 1985 negotiated agreement between the Union and Oscar Mayer a retiree's benefits paid from the Pension Plan are offset on a dollar-for-dollar basis by workers' compensation payments except for "loss of a body member."

Huppeler and Sandmire are subject to the 1985 agreement which includes a provision for workers' compensation

offsets because they retired after 1985. Sandmire disputes that he is subject to said agreement. All three Plaintiffs have received early retirement or retirement benefits from Oscar Mayer and have not received disability benefits. All three plaintiffs allege they have suffered work related permanent hearing loss. Only Huppeler has filed and received workers' compensation benefits for loss of hearing which he filed and received **after** he retired.

The Department of Industry, Labor & Human Relations (DILHR) 's Worker's Compensation Division awarded Huppeler an award of 45.58 weeks of payments at a rate of $144 per week in a lump sum payment of $6,563.62 based on Huppeler's wage rate while at Oscar Mayer as a result of his 21.1 percent permanent partial bilateral hearing handicap. The Labor & Industry Review Commission (LIRC) affirmed DILHR and the award of workers' compensation benefits on February 26, 1993. On May 14, 1993 Huppeler received a letter from Oscar Mayer's Employee Benefits Manager where he was advised that his retirement benefits pursuant to the Pension Plan would be offset dollar for dollar with the amount received on workers' compensation. He was not advised of a claims or review procedure, although said procedures applicable to the Pension Plan are contained in the Pension Plan Summary Plan Description provided to Plan Participants. Huppeler never filed a claim pursuant to the internal claims procedure. All three plaintiffs disclaim any knowledge of an internal claims or review procedure. Huppeler has not sought or obtained paid employment since retirement.

Sandmire and the medical professionals he has consulted believe he has suffered a work related hearing impairment. He contacted an attorney to discuss filing a workers'

compensation claim concerning his hearing loss and was advised not to file because any benefits would be offset against his pension benefits and after lawyers fees he would actually lose money.

Magli believes he has suffered a permanent hearing loss which is work related and has refrained from filing a workers' compensation claim because he believes the benefits would be offset against his pension benefits.

MEMORANDUM

The motions before this Court have raised five issues to be decided.

Exhaustion

Defendant Oscar Mayer moves to dismiss plaintiffs' complaint alleging that defendant Huppeler has failed to exhaust his administrative remedies. Plaintiff stated he was not aware of any internal claims or review procedures and notes that the letter from Oscar Mayer informing him of the offset of his pension benefits did not reference any review procedure by which he could challenge Oscar Mayer's decision. Oscar Mayer argues that Huppeler did not utilize the claims procedure described in the Summary Plan Description which is provided to all pension plan participants.

In the absence of a statutory mandate it is within the sound discretion of the trial court to determine whether exhaustion of administrative remedies will be required for a claim brought pursuant to ERISA. The district court's

decision will be reversed only for an abuse of discretion. Janowski v. Int'l. Broth. of Teamsters, Inc., 673 F.2d 931, 935 (7th Cir. 1982), cert. den. 459 U.S. 858 (1982), vac. on other grounds 463 U.S. 1222 (1983); Powell v. A.T. & T. Communications, Inc., 938 F.2d 823, 825 (7th Cir. 1991). Exhaustion "is only appropriate where it is necessary to develop a full factual record or to take advantage of agency expertise." Janowski, 673 F.2d at 935. Where the issue is merely a question of statutory interpretation, exhaustion is not required. Id. at 935. Exhaustion of administrative procedures is also not required where the administrative procedure would be futile or would be a useless gesture. See Powell v. A.T. & T. Communications, Inc., 938 F.2d 823, 826 (7th Cir. 1991); Carter v. Signode Industries, Inc., 688 F. Supp. 1283 (N.D. IL. 1988).

Dismissing this case to require exhaustion of administrative procedures would not be efficient, would not serve justice, and would likely prove futile. Defendant Oscar Mayer, plan administrator, asserts that controlling Supreme Court precedent governs the dispute. There is no doubt that the pending motions concern only a question of law, the correct interpretation of Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). Indeed, defendant has filed a motion for summary judgment alleging there are no disputes of material fact. Requiring plaintiff Huppeler to argue his competing interpretation of Alessi to Oscar Mayer within the context of Oscar Mayer's administrative procedure would be wasteful and to no avail.

Moreover, Oscar Mayer cannot be heard to complain that the administrative procedures were not utilized where it

did not inform Huppeler of its review procedures in the letter to him when informed that his pension benefits would be offset by the workers' compensation award.

Proper Party Defendant

Defendant has moved the Court dismiss this action for failure to name a proper party defendant. Plaintiffs have amended their complaint to name as defendants the Pension Plan and Oscar Mayer as Plan Administrator. Oscar Mayer now concedes that it is a proper party defendant.

Magli and Sandmire as proper parties

Oscar Mayer also asserts that plaintiffs Magli and Sandmire are not proper parties to the action because they have neither suffered offsets of pension benefits, nor received workers' compensation awards for hearing loss and as such they do not have a "controversy" sufficient to join as parties to this declaratory judgment action.

A district court is without power to grant declaratory relief unless an "actual controversy" within the meaning of the Declaratory Judgment Act, 28 U.S.C. §400 exists. Maryland Casualty Co. v. Pacific Coal & Co., 312 U.S. 270, 272 (1941). The difference between an abstract question and a "controversy" is necessarily one of degree. Id. at 273.

> Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient

> immediacy and reality to warrant the issuance of a declaratory judgment.

Id.

Plaintiffs Magli and Sandmire have stated in affidavits that they have suffered hearing loss and have not filed workers' compensation claims because of Oscar Mayer's policy which offsets pension benefits by workers' compensation awards. The injury, hearing loss, is not dependent on any factors; it has already occurred. The legal interests are sufficiently adverse; Oscar Mayer wants to continue to offset pension benefits with workers' compensation awards and plaintiffs Magli and Sandmire want Oscar Mayer's offset policy to be declared illegal so they may file for workers' compensation benefits without a resulting offset.

Motion to dismiss or summary judgment

Oscar Mayer asserts that this case should be dismissed for failure to state a claim upon which relief can be granted because the allegations in the complaint do not state a claim for relief. Plaintiffs argue that summary judgment is proper because factual evidence other than the assertions contained in the complaint are required for a proper disposition of the case. Plaintiffs Magli and Sandmire joined Huppeler's motion for summary judgement.

Pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, if on a motion for dismissal for failure to state a claim, "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one

for summary judgment." Fed. R. Civ. P. 12 (b) (6). The court has relied on matters outside the pleadings, and this action will be treated as one for summary judgment.

Merits

Plaintiffs assert that offsetting pension benefits by workers' compensation benefits awarded for permanent hearing impairment violates 29 U.S.C. §1053 (a), the non-forfeiture provision of the Employee Retirement Income Security Act of 1974 (ERISA). Oscar Mayer asserts that Alessi, the controlling Supreme Court precedent, sanctions the offset of pension benefits by all workers' compensation awards without regard to the character of said award.

Plaintiffs and defendant dispute the interpretation of Alessi as have the Ninth, Fourth and Sixth Circuits. Plaintiffs essentially argue that Alessi holds that pension benefits may be offset by workers' compensation benefits which have the character of wage replacement, but those benefits which provide "fixed sums for bodily impairment," are not subject to integration. Defendant interprets Alessi as holding pension benefits may be offset by any workers' compensation benefits regardless of their character. Because plaintiffs argue that workers' compensation awards for permanent partial hearing loss fit under the rubric, "fixed sum for bodily impairment," it is necessary to decide which of the competing interpretations is correct.

The Court held that in the enactment of ERISA Congress contemplated and approved the kind of pension provisions challenged in Alessi which permits offsets of

pension benefits based on workers' compensation awards. Id. at 526. The Court also held that the New Jersey law that prohibited the integration of pension benefits with workers' compensation was preempted by ERISA pursuant to 29 U.S.C. § 1144. Id. at 522. The Court found that ERISA was an area of exclusive federal concern and noted that since ERISA leaves integration of pension plans subject to the discretion of pension plan advisors, which in this instance are the products of collective bargaining agreements, there is an additional federal interest in precluding state interference with labor-management negotiations. Id. at 524-525.

The Alessi plaintiffs were retired employees whose pension benefits were offset by their workers' compensation awards pursuant to a provision in their pension plan resulting from collective bargaining that required such offsets. Id. at 507-508.

The Court in Alessi made the broad assertion that pension benefits may be offset by workers' compensation awards. This may suggest that the character of the workers' compensation award is not an issue, especially where the class of plaintiffs was so large. However, the Alessi Court did not explicitly state that pension benefits may be offset by **all** workers' compensation awards, regardless of their character.

The Court discussed IRS rulings on pension plan integration which it held were embraced by Congress when enacting ERISA. See Alessi, 451 U.S. at 519-521. After stating that the IRS has allowed offsets for workers' compensation benefits the Court then notes that funds

received for "bodily impairment" or as reimbursement for medical expenses may not be used to offset pension benefits. The Court cites to Revenue Ruling 78-178 as authority for this proposition, see Id. at 520-521, which does not state that workers' compensation awards for "bodily impairment" may not be used to offset pension benefits, It does provide, however, that awards for sickness and maternity may not be used as offsets because these benefits do not correspond to benefits allowed under a qualified ERISA pension plan. Rev. Rul. 78-178 also states that workers compensation awards may be used to offset pension plan benefits for they correlate with the benefits which may be provided under an ERISA qualified pension plan because workers' compensation awards are provided upon disablement and ERISA allows for pension plans to pay benefits upon disablement. Id.

Any ambiguity is intensified in Alessi when the Court notes that sums received for "bodily impairment" may not be used to offset pension benefits and that the pension plan covering General Motors' employees "avoids any ambiguity on this point" because it provides for the offset of pension benefits by all workers' compensation awards, but not the workers' compensation awards for medical expenses, fixed statutory payments for the loss of any bodily member or 100% loss of use of any bodily member, or payments for the loss of industrial visions. see Alessi, 451 U.S. at 521 n. 17.; 451 U.S. at 507-508 n. 1. The Court goes on to state that Raybestos does not have a similar limitation in its clause providing for the offset of pension benefits by workers' compensation but states that this clause "is of course subject to IRS regulation". Id. at 521 n. 17.

We accordingly are left with a broad holding in Alessi that offsetting pension benefits, although the Alessi Court, given a broad group of plaintiffs, did not examine the character of the awards. Alessi does not contain a definition of "bodily impairment." At a minimum, however, it must mean loss of a body member or loss of 100% use thereof or loss of industrial vision. See id.

The Ninth Circuit has interpreted Alessi other than have the Second, Fourth, and Sixth Circuits. The Ninth Circuit in Losada v. Golden Gate Disposal Co., 950 F.2d 1395 (1991) interpreted Alessi as holding that only workers' compensation awards in the nature of wage replacement may be used to offset pension benefits and that workers' compensation awards in the nature of bodily impairment may not be offset against pension benefits, id. at 1400. The Ninth Circuit held that state law must be examined to determine the character of the workers' compensation award, id. at 1400-1401, and reasoned the since the workers' compensation award occurred after retirement, any lost wages would have been negligible, thus the award was for bodily impairment and not subject to an offset. Id. at 1400.

In contrast, the Fourth Circuit in PPG Industries v. Crew, 902 F.2d 1148 (1990) held that under Alessi offsets of pension benefits by a workers' compensation award for a permanent total disability were valid. The plaintiffs in PPG suffered from permanent dust pneumonia and the workers' compensation claims were filed approximately eleven years after retirement. The award covered the period of time from retirement to the date of the award. The Court did not discuss the character of the workers' compensation award

under state law. Id. at 1149.

Similarly in Kapucinski v. Plan Administrator, 658 F.2d 4 27 (1981) the Sixth Circuit held that the offset of pension benefits by workers' compensation awards was valid under Alessi's interpretation of ERISA. The Court made no distinction between the types of workers' compensation awards. The opinion did not contain a discussion of why plaintiff received workers' compensation and the fact that the plaintiff filed for workers' compensation **after** he retired did not influence the Sixth Circuit's analysis.

Finally, in Reska v. Pension Plan, 848 F.2d 372 (1988), the Second Circuit faced facts almost exactly as here. Plaintiff received a workers' compensation award for a twenty percent hearing loss, id. at 373, asserting said hearing loss was "bodily impairment" and could not be subject to an offset under Alessi. Id. at 374. The Court refused to decide whether Alessi or relevant IRS rulings apply to all or only some workers' compensation awards. Id. at 375. The Second Circuit stated "[e]ven assuming arguendo, that Alessi only applies to workers' compensation awards 'in the nature of wage replacement,' appellant has failed to demonstrate that his award for partial hearing loss was not provided for wage replacement." Id. The Court then examined state law and determined that in New York even scheduled awards were intended to compensate for loss of presumed earning power and the offset was proper. Id.

Plaintiffs Huppeler, Magli and Sandmire assert that awards for permanent partial hearing loss are awards for "bodily impairment" under Wisconsin case law, that awards

received after retirement are not in the nature of wage replacement and are accordingly awards for "bodily impairment."

Given the broad preemption of state law by ERISA in the field of pension plans state law is not examined. The Supreme Court in Alessi noted that ERISA contains an explicit congressional statement concerning the pre-emptive effect of ERISA:

> [T]he provisions of this subchapter...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.

Alessi, 451 U.S. at 522 quoting 29 U.S.C. §1144(a). The Court stated that this provision was "meant to establish pension plan regulation as exclusively a federal concern." Id. at 523. Moreover, nowhere in the entire opinion did the Court in Alessi discuss the character of workers' compensation awards under state law. Given the strong federal interest in the uniform enforcement of ERISA, this court declines to engage in a practice that would lead to different rulings in different circuits on whether all workers' compensation awards may be used to offset pension benefits based on the varying character of the workers' compensation awards under state law. Under Alessi state laws which prohibit offsets of pension benefits by workers' compensation are pre-empted. This Court will not accept a practice whereby a state may provide its workers' compensation awards for bodily impairment, thereby avoiding pre-emption by ERISA and reversing the IRS and Supreme

Court practice of sanctioning pension plan integration of workers' compensation awards.

There is another important federal interest here at risk. There is a reluctance to interfere with the relationship between labor and management by changing an agreement in which defendant Oscar Mayer and the Union negotiated an offset provision. See id. at 525. The agreement provided for the offset of pension benefits by workers' compensation awards, except awards for "loss of a body member." Had defendant and the Union intended to exempt compensation awards for partial hearing loss from pension benefits, they would have done so clearly. This Court refuses to rewrite the labor agreement.

Further, the offset of workers' compensation awards for partial hearing loss would not have violated the agreement approved by the Court in Alessi. An award for hearing loss would have been subject to an offset under the agreement in Alessi because hearing loss would not have been included under the rubric of loss of a body member.

Accordingly, the offset of pension benefits by workers' compensation awards for partial loss of hearing does not violate ERISA.

ORDER

IT IS ORDERED that the motion of defendant Oscar Mayer to dismiss for failure to exhaust administrative procedures is DENIED.

IT IS FURTHER ORDERED that motion of defendant Oscar Mayer to dismiss for failure to name a proper party defendant is DENIED.

IT IS FURTHER ORDERED that motion of plaintiffs Huppeler, Magli and Sandmire for summary judgement is DENIED.

IT IS FURTHER ORDERED that motion of defendant Oscar Mayer for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant Oscar Mayer Foods Corp. against the plaintiffs Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire DISMISSING plaintiffs' complaint and all claims contained therein with prejudice and costs.

Entered this 27th day of October, 1993.

BY THE COURT:

JOHN C. SHABAZ
District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

OCTOBER 4, 1994

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire
Plaintiffs-Appellants,

No. 93-3765 v.

Oscar Mayer Foods Corporation, Plan Administrator, and Pension Plan No. 1
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin. No. 93 C 370 John C. Shabaz, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* and the response thereto filed in the above-captioned case, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

OCTOBER 5, 1994

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire
Plaintiffs-Appellants,

No. 93-3765 v.

Oscar Mayer Foods Corporation, Plan Administrator, and Pension Plan No. 1
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 93 C 370
John C. Shabaz, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* and the response thereto filed in the above-captioned case, no judge in active service* has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Walter J. Cummings, Circuit Judge, did not participate in consideration of the petition for rehearing.

JUDGMENT IN A CIVIL CASE
United States District Court
Western District of Wisconsin

Robert Allan Huppeler, Edwin C. Magli
and Ellwood Sandmire
Plaintiffs,

Docket Number 93-C-370-S

v.

Judge John C. Shabaz

Oscar Mayer Foods Corp.
Defendant.

_____ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came on for consideration before the court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

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that judgment is entered in favor of the defendant Oscar Mayer Foods Corp. against the plaintiffs Robert Allan Huppeler, Edwin C. Magli and Ellwood Sandmire DISMISSING plaintiffs' complaint and all claims contained therein with prejudice and costs.

/s/ Joseph W. Skupniewitz, Clerk

10-29-93